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82-617
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FREDERICK PFEIFFER,

Petitioner,

vs.

ESSEX WIRE CORPORATION, a Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether compensatory damages for pain and suffering are properly recoverable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*

(2) Whether punitive damages are properly recoverable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*

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Age Discrimination in Employment Act of 1967

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Frederick Pfeiffer, the Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above entitled matter on July 8, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed, is reported at 682 F.2d 684 (7th Cir. 1982) and

is reprinted at Appendix A to this Petition. The United States District Court memorandum dated September 23, 1982 is reprinted at Appendix B. A minute order, dated December 1, 1980, is reprinted at Appendix C and an Order of Court, which was entered concurrently with the minute order, is attached hereto as Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals was entered July 8, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The remedial scheme of the Age Discrimination in Employment Act of 1967 (hereinafter referred to as ADEA) is set forth in 29 U.S.C. Section 626 (b) and (c) and provides as follows:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in Sections 211 (b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under Section 623 of this title shall be deemed to be a prohibited act under section 215 of the title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title:

Provided, that liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts to be deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, that the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

29 U.S.C. § 626 (b), (c) (1976 & Supp. II 1978).

STATEMENT OF THE CASE

Petitioner, FREDERICK PFEIFFER, was hired by the Amphenol-Borg Company, predecessor of the Respondent, ESSEX WIRE CORPORATION, on November 4, 1941. Respondent purchased the Amphenol-Borg Company in 1969 and Petitioner remained as an hourly employee in said plant. Petitioner was transferred from an hourly status to a salary status on August 14, 1972 and remained a salaried employee until his termination with the Respondent on October 17, 1975.

At the time of his discharge, Petitioner was 54 years of age with a combined term of employment of almost thirty-five years with the Respondent and its predecessor Amphenol-Borg Company. Respondent replaced Petitioner with a forty-five year old employee.

Petitioner commenced an action against Respondent on April 4, 1977 alleging that his discharge violated ADEA. At trial, upon the merits of the Petitioner's claim, the jury returned separate verdicts against the Respondent. The jury assessed Petitioner's actual and compensatory damages in the amount of $32,259.96 and punitive damages in the amount of $150,000.00. Respondent subsequently filed timely post trial motions for judgment notwithstanding the verdict, or in the alternative, for a new trial.

By Memorandum dated September 23, 1980, attached hereto as Appendix B, the Honorable George N. Leighton, United States District Court Judge, concluded that during the trial he had erred in ruling on the admission of evidence and erred in instructing the jury on the issue of damages recoverable under the ADEA. Accord-

ingly, by Minute Order dated December 1, 1980, attached hereto as Appendix C, and by Order of Court entered concurrently therewith, attached hereto as Appendix D, Judge Leighton denied the motion of Defendant for judgment notwithstanding the verdicts but granted its motion for a new trial.

That in said Order of Court, attached hereto as Appendix D, Judge Leighton, pursuant to authority vested in him by 28 U.S.C. § 1292(b), certified for interlocutory appeal certain questions of law which concern the appropriate standard of recovery under the ADEA, 29 U.S.C. §§ 621 *et seq.* On February 2, 1981, the United States Court of Appeals for the Seventh Circuit granted Plaintiff's Petition for Permission to Appeal under 28 U.S.C. § 1292(b) in order to consider whether punitive damages and compensatory damages for pain and suffering are properly recoverable under the ADEA, 29 U.S.C. §§ 621, *et seq.*

The United States Court of Appeals for the Seventh Circuit concluded that punitive damages and damages for pain and suffering were not available under ADEA. Consequently, it affirmed the District Court's Order granting a new trial and remanded for further proceedings. A copy of the Court of Appeals' Opinion is reprinted at Appendix A.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the remedial provisions of ADEA, specifically whether compensatory damages for pain and suffering and punitive damages are available under the Act. The Court of Appeals held that these damages are not available under ADEA. This decision, if allowed to stand, will deny aggrieved employees of full compensation for all actual injuries sustained as a result of a violation of ADEA. Furthermore, there will be no deterrent to the willful illegal acts of employers. Because these remedies effectuate the purposes of the ADEA, review by this Court is warranted.

1.

The ADEA provides in part that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies and procedures provided in sections 211(b), 216 (except for subsection (a) thereof) and 217 of this title *and subsection c of this section*." 29 U.S.C. § 626(b) (emphasis added). Subsection (c) of Section 626 provides that "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction for such *legal or equitable relief as will effectuate the purposes of this chapter*." 29 U.S.C. § 626(c) (emphasis added).

It is clear from the statutory language contained in Section 7(b) that Congress intended the remedies in Section 7(c) to supplement the remedies available under the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1976 & Supp. III 1979) (sections 211(b), 216 (except subsection (a) thereof) and 217 of FSLA). *See Flynn v. Morgan Guaranty Trust Co. of New York*, 463 F. Supp.

676 (E.D.N.Y 1979). The ADEA expressly provides that courts shall have jurisdiction to grant such "legal or equitable relief as will effectuate the purposes" of ADEA, 29 U.S.C. § 626(b), suggesting that appropriate relief *in addition* to that specifically provided by the statute can be awarded. Furthermore, Section 7(b) provides that relief under the ADEA includes "*without limitation* judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section." 29 U.S.C. § 626(b) (emphasis added). Because the statute states that relief is available "without limitation," these two provisions suggest the statute makes all legal and equitable relief available and lists specific forms of relief only as examples. Thus, the listing of remedies under Section 7(b) is illustrative rather than limiting.

Accordingly, numerous courts have found compensatory damages for pain and suffering to be properly recoverable under the ADEA. *See Kalli v. Great Am. Ins. Co.*, 516 F. Supp. 1273 (D. Minn. 1981); *Wise v. Olan Mills Inc. of Tex.*, 485 F. Supp. 542 (D. Colo. 1980); *Hassan v. Delta Orthopedic Medical Group*, 426 F. Supp. 1063 (E.D. Cal. 1979); *Bertrand v. Orkin Exterminating Co.*, 419 F. Supp. 1123 (N.D. Ill. 1976). Similarly, courts have found punitive damages to be a proper legal remedy under the ADEA. *See Wise v. Olan Mills Inc. of Tex.*, 485 F. Supp. 542 (D. Colo. 1980); *Kennedy v. Mountain States Tel. & Tel. Co.*, 449 F. Supp. 1008 (D. Colo. 1980); *Karijolic v. Illinois Bell Telephone Co.*, 19 F.E.P. Cases 447 (N.D. Ill. 1977).

Consequently, in order to enforce the plain meaning of the aforesaid statutory language, punitive damages and compensatory damages should be recoverable under the ADEA.

2.

The Court of Appeals erred in concluding that Congress did not intend ADEA to allow punitive damages or compensatory damages for pain and suffering. In reaching its decision, the Court relied on the following portion of the Congressional Committee Report accompanying the 1978 amendments to ADEA:

> Under section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 of the FLSA, "amounts owing" contemplates two elements: First, it includes items of pecuniary or economic loss such as wages, fringe, and other job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA.
>
> The Supreme Court recently ruled that a plaintiff is entitled to a jury trial in ADEA actions for lost wages, but it did not decide whether there is a right to jury trial on a claim for liquidated damages *Lorillard v. Pons*, 98 S.Ct. 866 (1978). Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury. The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages" *Overnight Transportation Company v. Missel*, 316 U.S. 572, 583-84 (1942).

House Rep. No. 95-950, 95th Cong., 2d Sess. 13-14, *reprinted in* [1978] U.S. Code Cong. & Ad. News 528, 535. The Court believed that this language, when coupled

with the fact that the framers of the amendment could be presumed to have been aware of decisions such as *Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 439 U.S. 1022 (1978), which denied punitive damages and compensatory damages for pain and suffering, was highly persuasive, if not dispositive in determining the congressional intent to disallow such damages.

Reliance upon the language contained in the Committee Report cannot withstand close scrutiny. The Report states that ADEA does not provide remedies of a punitive nature and it indicates that liquidated damages, rather than being punitive in nature, are intended to compensate victims of age discrimination from non-pecuniary damages resulting from an employer's willful violation of the Act. Courts, however, have consistently held that the liquidated damages provision of the ADEA is punitive in nature. *Rogers v. Exxon Research & Engineering Co.*, 550 F. 2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *Wagner v. Sperry Univac, Div. of Sperry Rand Corp.*, 458 F. Supp. 505, 518 (E.D. Pa. 1978). Furthermore in *Wise v. Olan Mills Inc. of Tex.*, 485 F. Supp. 542 (D. Colo. 1980), the Court specifically rejected the argument that the Conference Committee Report reflects a congressional intent to preclude the recovery of punitive damages under ADEA. The *Wise* Court concluded that "given the Act's unambiguous language and statement of purpose, as well as the fact that the Conference Report focuses on amendments to the Act's jury trial provision, not its remedial provisions, this Court does not consider the Conference Report dispositive." *Id.* at 544. Thus, the Court of Appeals' reliance on the Report does not support a finding of Congressional intent to disallow punitive damages and compensatory damages for pain and suffering.

The unambiguous language in Section 7(b) of the ADEA that there shall be no limitation on the remedial powers of the Court to utilize "such legal and equitable relief as may be appropriate to effectuate the purposes" of ADEA demonstrates that Congress intended a wide range of relief to be made available to eradicate age discrimination in employment. Furthermore, Section 7(c) contains no restrictive language whatsoever on courts' remedial powers to utilize full legal and equitable relief in private ADEA actions. Moreover, Congress expressly stated in Section 7(b) that the FLSA remedies enumerated therein shall be supplemented by the broad relief available under Section 7(c) of the ADEA.

Where the clear statutory language provides a reasonable means to achieve the purpose of the legislation, the plain meaning of the words of the statute should be followed. *Helvering v. City Bank Co.*, 296 U.S. 85, 89 (1935). Moreover, in determining legislative intent, the best evidence thereof is the text of the statute itself. *Patagonia Corp. v. Board of Gov. of Fed. Res. System*, 517 F.2d 803, 813 (9th Cir. 1975).

Because the express language of the ADEA clearly shows that Congress intended a wide range of relief be made available to eradicate age discrimination in employment, the Court of Appeals' conclusion that Congress did not intend punitive or compensatory damages for pain and suffering to be recoverable under the ADEA is unfounded.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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